

ARKANSAS COURT OF APPEALS

DIVISION I

No. CA08-79

BENJAMIN A. HESS

APPELLANT

V.

WAL-MART STORES, INC. and
CLAIMS MANAGEMENT, INC.

APPELLEES

Opinion Delivered September 10, 2008

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F512614]

AFFIRMED

LARRY D. VAUGHT, Judge

Appellant Benjamin Hess appeals the decision of the Workers' Compensation Commission. According to the Commission, Hess failed to prove—by a preponderance of the evidence—that he sustained an injury arising out of and during the course of his employment with Wal-Mart. Hess takes further issue with the Commission's conclusion that his back injury, need for medical treatment, and resulting disability were not causally connected to a work-related injury. We affirm.

At the time of his claim, Hess was fifty-six years old, with a high school education and some additional vocational training. He had worked for Wal-Mart for more than eight years. Hess testified that on October 30, 2005, he was working in grocery receiving as an inventory-control specialist. According to Hess,

Mr. Morgan and I were gone to lunch. Jerry Morgan usually went home for lunch and I stayed there. And approximately 45 minutes or so into my lunch

break, I was asked by a member of management to go ahead and help download the truck. I was paged, and I answered the page, and that's what they told me. And when I went, I went ahead and downloaded the truck.

Hess explained that he unloaded the truck using a "power pallet jack" that weighs approximately 800 to 900 pounds. He further noted that although a member of management opened the loading area, the person did not stay for the unloading. Hess stated that he

used the power pallet jack, drove it up in the truck, picked up the pallet, backed it right out of the truck, no problem whatsoever, rolled it around to stage it, and I sat it down on the floor. And as I did so, I lowered it down and pressed the release lever – the reverse lever on the power pallet jack, and you could hear the relays, the electronic relays inside kick in, and you could hear the motor attempt to move it but it wouldn't move. It wouldn't hardly move. It barely crept back at a very minimal speed, so I moved it back as far as it would go, moved it forward again and clicked it back in reverse again, and it did basically the same thing. And after having done that for several attempts, I attempted to help pull it out from underneath the pallet.

Following this attempt, Hess stated that he hurt his back, experiencing "a sharp pain just about like somebody walk up and slap you in the middle of the back with a tight muscle, you know." He stated that he did not immediately report the injury because he thought it might have been a mere "muscle pull" or "sore muscle." He further noted that the only witness to his injury was the truck driver, who was not a Wal-Mart employee.

Although the injury occurred around 6:00 p.m., Hess finished his shift, which ended at 8:00 p.m. He testified that he had no back problems that "alarmed" him during these last hours. He did state that his back "was sore and sensitive, but not over-extremely sensitive." Hess acknowledged that the two days after his injury were his pre-determined days off, and he did not see a doctor on either of his days off. He stated that although he woke up the day after his alleged injury "a little stiffer and sore," after he applied heat to his back it felt "fairly

decent” and his pain “was nothing major to get overly concerned about.” He further testified that when he returned to work on Wednesday, November 2, he reported his injury to Okneco Stitts, the grocery supervisor.

Interestingly, despite Hess’s assertion that the accident occurred on October 30 and that there were no witnesses except the unidentified truck driver, when he filled out an “associate statement” on November 17, 2005, he indicated that Jerry Morgan, a coworker, witnessed the incident. On direct-examination, Hess maintained that he reported the incident to Morgan on the same day of its occurrence. Although Morgan was identified as a corroborating witness by Hess (who subpoenaed Morgan to testify at the hearing), Hess did not question Morgan. Instead, Wal-Mart called Morgan as a witness. Although he could not recall the precise date, he confirmed that Hess had reported experiencing back problems after October 30, 2005. Morgan recalled that Hess specifically complained “that he pulled his back in the water hole.”

Donnie Watson was also called as a witness by Wal-Mart. Watson gave a written statement that sometime after Hess filed his November 17, 2005, associate statement, Watson observed Hess engaged in league bowling at Thompson Bowling Center. Watson recalled that he had not seen Hess at work and found it curious that Hess was bowling but not working. Okneco Stitts was also called as a witness by Wal-Mart. Stitts was Hess’s immediate supervisor in October and November of 2005. Stitts testified that Hess did not report a work-related injury to her. She maintained that she first learned of Hess’s alleged back injury after he filled out the associate statement.

Finally, Hess's wife was called as a rebuttal witness to refute the testimony that her husband was bowling during his convalescence. As the bowling-league secretary, Ms. Hess was responsible for maintaining the team records. She testified that—according to the records she maintained on her home computer—Mr. Hess had not bowled since October 30, 2005. She also admitted that the bowling alley maintained independent records but that she failed to bring those records to the hearing.

According to the medical records presented at the hearing, Hess had sustained prior back injuries (which were covered by workers' compensation) and had received conservative treatment for these injuries. Likewise, in this instance Hess was treated conservatively and returned to work. He worked until around December 4, 2005, when he quit work because of his back problems, and he has not been gainfully employed since. Following various diagnostic studies, Hess was eventually referred to Dr. Jeffrey Kornblum, a neurosurgeon in Jonesboro, Arkansas. Ultimately, he underwent back surgery on March 17, 2006. Wal-Mart refused to accept financial responsibility for Hess's surgery and other medical treatment. The Commission agreed that because Hess failed to prove that he sustained his injury in the course and scope of his employment, he was not eligible for workers' compensation benefits. It is from this decision that Hess appeals.

On appeal, the opinion of the Commission must be affirmed if it is supported by substantial evidence. *Weaver v. Whitaker Furniture Co.*, 55 Ark. App. 400, 935 S.W.2d 584 (1996). Substantial evidence is relevant evidence such that a reasonable mind might accept as adequate to support a conclusion. *Id.* Further, the evidence must be viewed in the light most

favorable to the findings of the Commission's decision. *Express Human Res. III v. Terry*, 61 Ark. App. 258, 968 S.W.2d 630 (1998). It is not important whether the evidence would have supported a contrary finding, but if reasonable minds could arrive at the same decision as the Commission, the decision must be upheld. *Id.*

“Furthermore, it is well established that the credibility of witnesses and the weight to be given their testimony are matters exclusively within the province of the Commission.” *Weaver*, 55 Ark. App. at 404, 935 S.W.2d at 587. The Commission is not required to believe the testimony of the appellant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Id.*

Further, a compensable injury is an injury that causes internal or external physical harm to the body arising out of the course of employment. Ark. Code Ann. §11-9-402(4)(A) (Supp. 2003). Course of employment refers to the time, place, and circumstances under which the injury occurred. *Am. Red Cross v. Wilson*, 257 Ark. 647, 649, 519 S.W.2d 60, 63 (1975). Arising out of the course of employment refers to the causal relation between the appellant's injury and his employment. *Id.*

Thus, Hess was required to show that he suffered a specific injury in the course of employment with Wal-Mart. However, due in large part to the inconsistencies in Hess's testimony, the ALJ (and later the Commission) found that he failed to meet this burden. Indeed, he contradicted himself several times when recalling his initial injury. First, Hess stated that only the truck driver (who was not called at the hearing) witnessed the incident, then he reported that Morgan was present at the time of the accident. Hess also testified that he did

not immediately report the injury, but then in his associate statement he claimed to have immediately reported the event. Further, Hess testified that he told Morgan about the pallet-jack injury, but Morgan recalled Hess saying he hurt his back “in the water hole.” Hess also claimed that he reported his injury to Stitts on November 2, 2005, but Stitts denied having received any such report.

Finally, the Commission found Hess’s bowling habits suspect. He claimed that on the Monday following his accident he rolled four practice balls then felt so much pain in his back he was relegated to merely cheering his team on. He testified that he had not bowled since. However, the notes from his initial doctor’s visit, on November 9, 2005, show a handwritten note from Dr. Dye indicating that Hess did not work on Monday, but bowled on Tuesday and was to return to work on Wednesday. Also, Hess’s co-worker (Watson) provided the Commission with a statement swearing that he had observed Hess bowling on November 18, 2005.

While there is no question that objective medical evidence established the fact that Hess had back problems, we are satisfied with the Commission’s conclusion that Hess failed to show that his back ailments were caused by an accidental, work-related injury. In this case, there were no witnesses to the alleged event, and there was no report of the injury. Thus, the case hinged entirely on Hess’s credibility—or more specifically here, his lack thereof. As such, the decision of the Commission is affirmed.

On a final note, we would be remiss if we failed to acknowledge that it is not only Hess who is lacking credibility. In its brief to our court, Wal-Mart makes the following claim

relating to Hess's failure to immediately report his injury:

[Hess] was familiar with Wal-Mart's policies regarding this procedure because he had gone through it in 2002. In fact, Wal-Mart employees were trained to drop what they were doing and call in a code-white to let management know there was an accident. There were safety meetings outlining this procedure every morning. *For some reason* [Hess] chose not to report this incident. (Emphasis added.)

Might we suggest that the *reason* Hess (and other Wal-Mart employees) chose not to immediately report on-the-job injuries could possibly be due to Wal-Mart's "My Share Program." According to the record before us, the "My Share Program" provides financial incentives to workers who do not report their injuries and to their supervisors who successfully ward off reports. The troubling policy is described in detail in the ALJ's opinion, which states:

I must confess that I find this claim to be difficult and troubling. The record reflects a company policy which [sic] discourages the filing of workers' compensation claim. All employees, a/k/a associates, benefit financially through a bonus program called "My Share Program" which [sic] encourages employees to only report more serious injuries. Although it is unclear to me how the number of work-related incidents affects self-insured employers, the record reflects that employees have an incentive in not filing a workers' compensation claim.

It is one thing for Wal-Mart to make no mention of its questionable business practice on appeal. But to couple such an omission with a claim of ignorance of the "reason" Hess might have delayed reporting his injury is quite another.

Affirmed.

GLOVER and BAKER, JJ., agree.